Public Prosecutor v Asnawi bin Yusuf

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–99 OF 2006

B

HASAN LAH, SULONG MATJERAIE AND MOHD HISHAMUDIN JJCA

2 JUNE 2011

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Criminal Procedure — Trial — Witnesses offered to defence — Prosecution unable to make offered witnesses available — Whether testimony of missing witnesses crucial for defence to raise reasonable doubt — Whether prosecution's reason that witnesses could not be traced because they were Indonesians tenable

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This was an appeal by the public prosecutor to the Court of Appeal against the High Court's decision to acquit and discharge the respondent of a charge of trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952. The High Court held the respondent's sworn testimony in his defence had raised a reasonable doubt over the prosecution's case. According to the prosecution's version of the events the respondent had dealt with a detective of the police narcotics division who posed as a buyer for cannabis. After the time and place for the sale and purchase of the drugs was concluded the respondent arrived at the rendezvous in a car and showed the detective two bags containing the cannabis in the car. At that juncture, a police party that lay in ambush moved in and arrested the respondent. In his testimony, the respondent said he stayed with his brother–in–law and fellow Indonesian, Edy Shahputra. The tenants of the adjacent house were also Indonesians, named Abdul Rahman and M Dahlan. Another person named Fakrullah used to come to the respondent's house for chats. On the fateful evening Abdul Rahman and Fakrullah came to the respondent's house in a car. Fakrullah asked the respondent to drive him to a restaurant for a fee since he (Fakrullah) was afraid to drive on the highway. Along the way Fakrullah asked the respondent to stop the car near some bushes by the road-side. Fakrullah got out and retrieved two packages from the bushes and got back into the car with them. The two of them then continued their journey. On arrival at the restaurant Fakrullah told the respondent to wait near the car while he went into the premises. Shortly after, a man approached the car and opened the rear door and about the same time five others who came in a car approached and handcuffed him. The respondent denied knowledge of the contents of the bags seized by the police and told police the car was Abdul Rahman's and the bags were Fakrullah's. Police eventually detained Abdul Rahman, Edy Shahputra, M Dahlan and the respondent but Fakrullah was not to be found. At the close of the prosecution's case the prosecution offered Abdul Rahman, Edy Shahputra and M Dahlan to the defence but could not make

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them available. The trial judge held this failure raised a reasonable doubt on the prosecution's case.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) The court agreed with the trial judge's finding that the production of Abdul Rahman, Edy Shahputra and M Dahlan might have established the existence of Fakrullah and the role played by him and consequently raised a doubt on the prosecution's case (see para 18).

(2) The respondent's counsel at trial gave ample warning to alert the court and especially the deputy public prosecutor that he intended to call M Dahlan, Edy Shahputra and Abdul Rahman. It was the bounden duty of the prosecution to have secured their attendance once they were offered as witnesses to the defence. Such failure occasioned a miscarriage of justice entitling the accused to an acquittal (see paras 22, 23 & 26).

(3) The reason proffered by the public prosecutor that the three witnesses could not be traced as they were Indonesians was untenable and indefensible particularly in a case that involved the liberty of an individual. There were provisions in our laws to ensure that this should not have happened (see para 23).

(4) The three missing witnesses were essential to the unfolding of the narrative of the defence's story as they were the only ones who could establish the existence of Fakrullah. Even the defence's application to recall the investigating officer of the case to ascertain if he had knowledge of Fakrullah and Abdul Rahman was denied. Consequently without their testimonies there was a gap in the narrative of the defence's story and this failure was attributable to the prosecution (see paras 25, 27 & 28).

[Bahasa Malaysia summary

Ini adalah rayuan daripada pendakwa raya kepada mahkamah terhadap keputusan Mahkamah Tinggi yang membebaskan dan melepaskan responden bagi tuduhan pengedaran di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Mahkamah Tinggi memutuskan bahawa keterangan bersumpah responden dalam pembelaan telah membangkitkan keraguan yang munasabah bagi kes pihak pendakwaan. Menurut versi kejadian pihak pendakwaan, responden telah berurusan dengan detektif bahagian polis narkotik yang menyamar sebagai pembeli kanabis. Selepas waktu dan tempat bagi jualbeli kesemua dadah tersebut diputuskan, responden tiba di tempat pertemuan di dalam kereta dan menunjukkan kepada detektif dua beg mengandungi kanabis di dalam kereta. Pada ketika itu, pasukan polis yang telah mengatur serang hendap masuk dan menangkap responden. Dalam keterangannya, responden mengatakan bahawa dia tinggal bersama abang iparnya dan seorang rakan yang juga warga Indonesia, Edy Shahputra. Penyewa rumah berdekatan juga adalah seorang warga Indonesia, bernama Abdul Rahman dan M Dahlan. Seorang lagi

yang bernama Fakrullah sering ke rumah responden untuk berbual-bual. Pada petang kejadian, Abdullah dan Fakrullah datang ke rumah responden dengan menaiki kereta. Fakrullah meminta responden menghantarnya ke restoran dengan upah kerana dia (Fakrullah) takut memandu di lebuhraya. Dalam perjalanan, Fakrullah meminta responden memberhentikan keretanya berdekatan semak di tepi jalan. Fakrullah keluar dan mengambil dua bungkusan dari semak dan masuk semula ke dalam kereta. Mereka berdua kemudiannya meneruskan perjalanan. Apabila tiba di restoran, Fakrullah memberitahu responden untuk menunggu berdekatan dengan kereta sementara dia masuk ke premis. Sejurus kemudian, seorang lelaki menghampiri kereta dan membuka pintu belakang dan lebih kurang waktu yang sama, lima yang lain yang datang berkereta menghampirinya dan menggarinya. Responden menafikan mempunyai pengetahuan akan kandungan kesemua bag yang dirampas oleh pihak polis dan memberitahu pihak polis bahawa kereta tersebut adalah milik Abdul Rahman dan kesemua bag adalah milik Fakrullah. Pihak polis kemudiannya menahan Abdul Rahman, Edy Shahputra dan M Dahlan dan responden namun Fakrullah gagal ditemui. Di akhir kes pendakwaan, pihak pendakwaan menawarkan Abdul Rahman, Edy Shahputra dan M Dahlan pembelaan tetapi gagal memanggil mereka. Hakim bicara memutuskan bahawa kegagalan ini membangkitkan keraguan munasabah bagi kes pendakwaan.

Memutuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Mahkamah bersetuju dengan keputusan hakim bicara bahawa dengan mengemukakan Abdul Rahman, Edy Shahputra dan M Dahlan mungkin boleh membuktikan kewujudan Fakrullah dan peranan yang dimainkan olehnya dan seterusnya membangkitkan keraguan bagi kes pendakwaan (lihat perenggan 18).

(2) Ketika perbicaraan, peguambela responden memberi banyak peringatan untuk memberitahu mahkamah khasnya timbalan pendakwaraya bahawa dia akan memanggil M Dahlan, Edy Shahputra dan Abdul Rahman. Adalah tanggungjawab pihak pendakwaan untuk memastikan kehadiran mereka apabila mereka telah ditawarkan menjadi saksi-saksi pembelaan. Kegagalan tersebut menyebabkan ketidakadilan dan memberi hak kepada untuk tertuduh bagi pembebasan (lihat perenggan 22, 23 & 26).

(3) Alasan yang diberikan oleh pendawaraya bahawa ketiga-tiga saksi tidak dapat dikesan kerana mereka adalah warga Indonesia tidak dapat dipertahankan khasnya di dalam kes yang melibatkan kebebasan seseorang individu. Terdapat peruntukan-peruntukan di dalam undang-undang untuk memastikan ini tidak seharusnya terjadi (lihat perenggan 23).

(4) Ketiga-tiga saksi yang hilang adalah penting untuk membentangkan kes pembelaan kerana hanya mereka sahaja yang boleh membuktikan kewujudan Fakrullah. Malahan, permohonan pihak pembelaan untuk memanggil semula pegawai siasatan kes bagi memastikan sama ada dia mempunyai pengetahuan mengenai Fakrullah dan Abdul Rahman juga ditolak. Akibatnya, tanpa keterangan-keterangan daripada mereka, terdapat jurang di dalam kes pembelaan dan kegagalan ini adalah berpunca daripada pendakwaan (lihat perenggan 25, 27 & 28).]

Notes

For cases on witnesses offered to defence, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) Paras 5497-5498.

Cases referred to

Maxwell v DPP [1934] All ER 168, HL (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(1)(a)

How May Ling (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

G Subramaniam Nair (Ebrina bt Zubir with him) (Maniam Nair & Co) for the respondent.

Sulong Matjeraie JCA (delivering judgment of the court):

[1] This is the judgment of this court on an appeal by the public prosecutor against the decision of the learned High Court judge who acquitted and discharged the accused at the end of the defence case.

BACKGROUND

[2] The respondent, Asnawi bin Yusuf, was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 for the offence of trafficking, to wit 28,666g of cannabis at Jalan Permas 10/10, Bandar Baru Permas Jaya in Johor Bahru on 14 March 2002.

[3] The respondent pleaded not guilty and the trial proceeded at the High Court at Johor Bahru. The prosecution called seven witnesses and at the close of the prosecution's case, the learned High Court judge found that a prima facie case had been made out and called the respondent to enter his defence under s 39B(1)(a) of the Dangerous Drugs Act 1952. After the respondent had given his sworn evidence in the court, the learned High Court judge decided that the respondent had raised a reasonable doubt in the prosecution case and acquitted

and discharged him on the charge of trafficking.

FACTS OF THE CASE

[4] The essential facts of the case led by the prosecution and relevant to this appeal may be summarised as follows.

[5] One Detective Corporal Ramli bin Saad ('SP3') from Bahagian Risikan Narkotik Bukit Aman, Kuala Lumpur was contacted on 1 March 2002 by an informer who wanted to introduce him to a supplier of cannabis in Johor Bahru. The following day SP3 went with Kpl Abdul Rahim bin Kiran ('SP6') to Johor Bahru where SP3 met the informer and an Indonesian supplier called 'Awi', the respondent.

[6] A discussion ensued between SP3 and the respondent wherein the latter confirmed that he could supply 30 kilos of cannabis at a rate of RM1,000 per kg and promised to get in touch with SP3 once supply was available.

[7] SP3 and SP6 returned to Kuala Lumpur and briefed SP4, ASP Zubir bin Ayob on the discussion and negotiation. A few days later, the respondent contacted SP3 by telephone saying that the cannabis was available and was ready for collection. SP3 informed SP4 who instructed that an operation be carried out.

[8] This resulted in SP4 leading a police party to Johor Bahru. The members comprised of SP3, SP6, Chief Inspector Mohd Alpiyang bin Ali, D/Sjn Abd Hamid bin Ujang, RF 114564 Rusli bin Johar, RF 118379 Mohd Jaini bin Haji Othman and RF 115915 Mohd Zin bin Pengcheng.

[9] On 13 March 2002 SP3 contacted the respondent and made arrangement to meet him at Restoran Sri Alam, Permas Jaya ('the said restaurant') at 8pm. The respondent said that the supply was ready and SP3 said he would be collecting the 30kg of cannabis near the said restaurant between 9pm to 10pm the next day.

[10] Briefing was held with the members of the police party involved in the operation and with SP3 and SP6 passing themselves out as the 'purchasers of cannabis'. A sum of RM30,000 was handed over to SP3 and SP6 as 'flash role' to convince the respondent of the purchase. The next day at about 9.30pm members of the police party took up their respective positions near the said restaurant.

[11] At about 10pm the respondent arrived and sat down with SP3 in the said restaurant. He said that the supply was ready but he wanted to see the money first. SP3 brought him to the car where SP6 was seated and showed him the money which were in a bag. Thereafter the respondent left riding a motorcycle. SP3 returned to the said restaurant while SP6 drove the car to the back of the said restaurant.

[12] The respondent came back at 11.30pm driving a white Proton Iswara bearing registration plate No JCS 5739 and after parking his car he went to meet SP3 at the said restaurant. Both of them then proceeded to the respondent's car. The respondent opened the back door and showed SP3 the bag which was placed at the back seat. He opened the bag and asked SP3 to look at the contents therein. SP3 saw the black bag and a packet of dried leaves suspected to be ganja. The respondent informed SP3 that there were 20 of them in the bag while ten in the plastic bag at the front passenger seat.

[13] Having satisfied himself that the incriminating drugs were ganja SP3 contacted SP6 to bring over the money. SP6 then contacted SP4 who instructed the raiding police party to move in resulting in the arrest of the respondent.

[14] Upon a body search made on the respondent, a Proton car key (P15) was found in the pocket of his trousers. SP4 went to the car and found that it was not locked. He saw the plastic package (P20) at the front passenger seat and upon searching the same he found ten plastic packets (P20A–J) containing dried leaves suspected to be ganja. At the back seat he saw the 'Silver Hawk' bag (P21) and in it 20 plastic packets (P21A–T) were found and they contained dried leaves suspected to be ganja.

[15] SP4 handed over the exhibits seized to the investigating officer, Chief Inspector Rejali ak Angong ('SP7') who handed the incriminating drugs over to the chemist, Soupy bin Daud ('SP5') whose analysis confirmed the incriminating drugs to be 28,666g of cannabis. The chemist report confirming the same was tendered as exh P28.

EVIDENCE OF THE RESPONDENT

[16] During examination-in-chief the respondent gave evidence under oath as follows:

(a) He arrived in Malaysia in 1991. In 1997 he went back to Ambon and later returned to Malaysia. From January to March 2002 he stayed at Taman Saujana Johor Bahru together with his brother-in-law one *Edy*

Shahputra. The tenants of the adjacent house were *Abdul Rahman* and *M Dahlan*. One *Fakrullah* used to come to his house for a chat. He used to come about three times a month.

These details are reflected at p 58 of the appeal record viz:

> ... Saya bekerja repair rumah di JB pada Jan–Mac 2002 — tiada ada pas pekerja. Rumah saya tinggal tidak bernombor — sewa dari seorang Melayu nama tidak tahu.
>
> Adik ipar saya bernama Edy Shahputra tinggal bersama saya. Di rumah sebelah penyewa adalah Abdul Rahman dan M. Dahlan. Rumah sebelah bersambung. *Fakrullah ada datang ke rumah 3 kali sebulan. Dia datang untuk berbual biasa*.

(b) Sometime in February 2002 Fakrullah brought the respondent on a motorcycle to a restaurant at Taman Harmoni, Johor Jaya where he met two Malay males. He forgot their names. For 20 minutes they sat together and talked but he could not fully understand them. He did not concentrate on what was discussed. Later Fakrullah sent him home on a motorcycle. The testimony of the respondent at p 58 of the appeal record was recorded as follows:

> Pada bulan Februari 2002 (hari tak ingat) *Fakrullah ada datang ke rumah dan ajak saya ke restoran di Johor Jaya. Taman Harmoni naik motorsikal*. Taman Harmoni sebelah Taman Saujana.

Fakrullah jumpa 2 lelaki Melayu di restoran (nama tak ingat). Saya duduk bersama tapi kurang faham apa yang dipercakapkan. Duduk lebih kurang 20 minit. Tidak tumpukan perhatian apa yang dibincang.

Selepas itu balik rumah ditumpang motosikal yang dipandu oleh Fakrullah.

Tidak kenal 2 lelaki Melayu yang bincang dengan Fakrullah — tidak cam mereka. (Emphasis added.)

(c) Sometime in March 2002 at 9pm Abdul Rahman together with Fakrullah came to his house in a white Proton Iswara bearing registration No JCS 5739. Fakrullah asked the respondent to drive him to Permas Jaya in the said car which he believed belonged to Abdul Rahman. He was promised by Fakrullah RM300 to drive the car as he (Fakrullah) was afraid to drive along the highway. At p 61 of the appeal record the accused testified as follows:

> Fakrullah tidak memandu kereta ke Permas Jaya malam itu kerana dia tidak berani memandunya di jalan besar. Fakrullah berjanji memberi saya RM300.00 jika memandu kereta ke Permas Jaya.

(d) Along the journey Fakrullah requested the respondent to stop the car near some bushes by the side of a road at Kampong 10, Taman Harmoni. Fakrullah got out of the car and took two packages from the bushes: one white and the other black in colour. The white package was placed by him on the floor of the front passenger's seat and the black package was placed on the back seat. Fakrullah then got into the car and sat on left side of the back seat. The respondent was directed to drive to Permas Jaya.

(e) On arrival at Permas Jaya the respondent was asked to stop beside a restaurant. It was a dark car parking area. Fakrullah then went into the restaurant while the respondent was asked to wait near the car.

(f) While waiting outside the car a Malay man approached the car and opened the rear door of the car near where the respondent stood. At the same time a car with five occupants approached him and the occupants jumped out of the car and assaulted him. The respondent fell and was arrested and handcuffed.

(g) The respondent denied that he knew the contents of the packages seized by the police and when questioned by them he answered 'kereta ini Abdul Rahman punya. Beg-beg Fakrullah punya'. On being questioned further as to the whereabouts of Fakrullah and Abdul Rahman the respondent answered that Abdul Rahman was at home. He also informed the police that Fakrullah was with him earlier and had run away.

(h) The respondent was taken by the police to the house at Taman Saujana to search for Abdul Rahman.

(i) Abdul Rahman, Edy Shahputra and M Dahlan were in the house and were brought to the police station at Plentong and were detained there together with the respondent. Fakrullah was not in the house.

[17] Although the prosecution appealed and argued on several grounds, we consider that pivotal to this appeal is the issue that relates to the failure of the prosecution to make available to the defence three witnesses, namely, Abdul Rahman, Edy Shahputra and M Dahlan offered to the defence at the close of the prosecution case. It cannot be over emphasised here that all of them had earlier on been detained by the police together with the respondent.

[18] It was the view of the learned trial judge that the failure of the prosecution to make available the three missing witnesses offered to the defence at the close of the prosecution case raised a reasonable doubt on the prosecution case. The learned trial judge felt that their production would go towards establishing the existence of Fakrullah and the role played by him and consequently raising a doubt in the prosecution case. We agree with the finding made by the learned trial judge.

[19] The appeal by the public prosecutor hinges on this singular issue.

EVIDENCE OF THE RESPONDENT AS FOUND IN THE APPEAL RECORD

[20] What is obvious from the testimony given is that the respondent shares the house with his brother-in-law, Edy Shahputra. He had two other neighbours, namely, Abdul Rahman and M Dahlan. At the end of the prosecution case, all the three of them were offered to the defence as reflected at p 51 of the appeal record which reads as follows:

> Pendakwaan menutup kes dan menawarkan C/Insp. Mohd Alpiyang, D/Sjn. Abdul Hamid Ujang, D/Mohd. Zin bin Pengcheng, D/Mohd. Jaini Othman, D/Rusli bin Johar, Insp. Arman bin Ibrahim, *M. Dahlan, Edy Shahputra dan Abdul Rahman bin Mohamad*. (Emphasis added.)

[21] This prompted learned counsel for the respondent to immediately respond on 6 December 2005 that should defence be called, the defence would require, Chief Inspector Mohd Alpiyang, M Dahlan, Edy Shahputra and Abdul Rahman bin Mohamad. At p 51 of the appeal record the following was recorded:

> Peguambela — saya memerlukan C/Insp Mohd Alpiyang, *M Dahlan Edy Shahputra dan Abdul Rahman bin Mohamad* dan Insp Arman bin Ibrahim jika pembelaan dipanggil. (Emphasis added.)

[22] Learned defence counsel gave ample warning to alert the court and especially to the learned deputy public prosecutor that it was his intention to call those witnesses including but not limited to M Dahlan, Edy Shahputra and Abdul Rahman.

[23] Now, perhaps curiously, when learned defence counsel wanted the above named three witnesses to testify, the public prosecutor said that all of them were not available. The reason proffered was that they cannot be traced as they are Indonesians! Such reason is simply untenable and indefensible particularly in a case involving the liberty of an individual. We have provisions in our laws to ensure that this should not have happened. It is clear law that when witnesses are offered by the prosecution to the defence at the end of the case for the prosecution, it is the bounden duty of the prosecution to avail these witnesses for the defence. If in the exercise of this duty, the prosecution fails to fulfill this obligation, the accused must be acquitted.

[24] It was in evidence that the so called three Indonesians Abdul Rahman, Edy Shahputra and M Dahlan ('the missing three witnesses') were arrested and brought to the Plentong Police Station, see p 61 of the appeal record.

[25] The three missing witnesses are important and material witnesses to the defence of the respondent in that they are the only people who can testify and establish the existence of Fakrullah. It cannot be over emphasised that the respondent is innocent until proven guilty and he must be given every opportunity to substantiate his story. Without these material witnesses the respondent will not be able to do so. It is not a question of these three missing witnesses being 'plugged from the air'; they were offered to the defence by the prosecution. The fact that the defence had already alerted the prosecution of their wish to call them makes it imperative for the prosecution to avail them. There is nothing unreasonable about this request. In addition to that it was the testimony of the respondent that Abdul Rahman came to the house on that fateful night when the respondent together with Fakrullah left in a car bearing registration No JCS 5739. Thus the evidence of Abdul Rahman is crucial to the respondent.

[26] It was obligatory for the prosecution to secure their attendance once they were offered as witnesses to the defence. Such failure had occasioned a miscarriage of justice.

[27] We are of the view that the three missing witnesses are essential to the unfolding of the narrative of the defence story. A perusal of the record of the proceedings reveals that learned counsel for the respondent applied to recall the investigating officer, Chief Inspector Rejali, to ascertain, if during the course of his investigation, he has knowledge regarding Fakrullah and Abdul Rahman (p 66 of the appeal record).

[28] This application was objected by the learned deputy public prosecutor and the learned High Court judge consequently refused the application to recall the investigating officer (p 66 of the appeal record). Consequently without their testimonies, there was a gap in the narrative of the story of the defence and this failure is attributable to the prosecution.

[29] The testimonies of the three missing witnesses are to establish the existence of Fakrullah and the role he played. Without their testimonies, there will inevitably be doubt in the prosecution case. In our criminal justice system principles such as these are sacred and sacrosanct; for it is better that one guilty man be freed than that general principles evolved by the dictates of justice for the conduct of criminal prosecutions be disregarded or discredited (see *Maxwell v Deputy Public Prosecutor* [1934] All ER 168).

[30] The result, therefore, is that we dismiss the appeal and we affirm the decision of the learned High Court judge in acquitting and discharging the respondent.

Appeal dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar